Filed 3/30/05 In re Anthony F. CA5

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

In re ANTHONY F., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. ANTHONY F., Defendant and Appellant.	F045907 (Super. Ct. No. JW095108-06) **OPINION**

THE COURT[*]

APPEAL from a judgment of the Superior Court of Kern County. H.A. Staley, Judge.

Kenneth Carver and Bradley Bristow, under appointments by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Mary Jo Graves, Assistant Attorney General, J. Robert Jibson and Carlos A. Martinez, Deputy Attorneys General, for Plaintiff and Respondent.

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[*] Before Dibiaso, Acting P.J., Buckley, J., and Gomes, J.

The court readjudged appellant, Anthony F., a ward of the court (Welf. & Inst. Code, § 602) after it sustained allegations in a petition charging him with felony false imprisonment (count 5/Pen. Code § 236)[1] and two counts each of sexual battery (counts 1 & 2/§ 243.4, subd. (d)) and annoying a child (counts 3 & 4/§ 647.6). On June 8, 2004, the court committed Anthony to the Kern County Crossroads Facility for a maximum term of confinement of 5 years 10 months. On appeal, Anthony contends: 1) the evidence is insufficient to sustain the court's true findings as to counts 1 and 2; 2) the court erred in not striking counts 1 and 2 because they are lesser included offenses of the offenses which were sustained in counts 3 and 4; and 3) the evidence is insufficient to sustain the court's finding that he committed felony false imprisonment. We agree with Anthony's first and third contentions.

FACTS

At Anthony's jurisdictional hearing 14-year-old Sarah I. testified that on May 10, 2004, she, Joshua Blankenship, and 14-year-old Maureen H. were on the steps of Maureen's home in Maricopa when 16-year-old Anthony walked up to Maureen and placed his right arm around her waist. Anthony then grabbed Maureen's buttocks once and one of her breasts once over her clothing. Maureen pushed his hand away each time and eventually pushed Anthony away. She and Sarah then walked into the house.

Sarah also testified regarding an incident that occurred three weeks prior to the incident with Maureen when Anthony appeared at her bedroom window at approximately 12:00 a.m. After Sarah went to the open window Anthony reached in and grabbed one of her breasts over her clothing for approximately two seconds.

Maureen testified that when Anthony approached her and Sarah on the porch, he put his arm around her waist and would not let go for approximately 10 minutes. During

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1 All further statutory references are to the Penal Code, unless otherwise indicated.

that time he grabbed her buttocks three or four times and squeezed them for a couple of seconds each time. He also squeezed one of her breasts. Maureen kept pushing Anthony's hand away and telling him to stop but he would just put it back. She also tried to break away but was unable. When Anthony finally let her go, Maureen went with Sarah into the house.

Anthony testified that he went to Maureen's house on May 10, 2004, to get some worming medicine for his dog from Joshua. During that time Maureen grabbed his penis after Joshua told her he would light her cigarette if she did. Anthony denied grabbing Maureen's buttocks or breasts.

Anthony admitted going to Sarah's window late at night although he claimed this incident happened in May 2004 and that he was accompanied by Joshua. Anthony also denied grabbing Sarah's breast.

DISCUSSION

Counts 1 and 2

Count 1 alleged that Anthony violated section 243.4, subdivision (d) as follows:

> "On or About May 10, 2004, Anthony . . . did willfully and unlawfully touch an intimate part of Maurine . . ., against the will of said person and with the specific purpose of sexual arousal, sexual gratification or sexual or sexual abuse in violation of . . . section 243 .4(d), a misdemeanor. . . ." (Original all in capital letters.)

Count 2 alleged that Anthony violated section 243.4, subdivision (d) as follows:

> "On or About April 15, 2004, and May 10, 2004, Anthony . . . did willfully and unlawfully touch an intimate part of Sarah . . ., against the will of said person and with the specific purpose of sexual arousal, sexual gratification or sexual or sexual abuse in violation of . . . section 243 .4(d), a misdemeanor. . . ." (Original all in capital letters.)

Section 243.4, subdivision (d) in pertinent part provides:

> "Any person who, for the purpose of sexual arousal, sexual gratification, or sexual abuse, *causes another, against that person's will while that person is unlawfully restrained either by the accused or an accomplice*, or is institutionalized for medical treatment and is seriously

> disabled or medically incapacitated, *to masturbate or touch an intimate part of either of those persons or a third person, is guilty of sexual battery*. A violation of this subdivision is punishable by imprisonment in a county jail for not more than one year, and by a fine not exceeding two thousand dollars ($2,000); or by imprisonment in the state prison for two, three, or four years, and by a fine not exceeding ten thousand dollars ($10,000)." (Emphasis added.)

Section 243.4, subdivision (f) defines the word "touch" as used in subdivision (d) as "physical contact with the skin of another person whether accomplished directly or through the clothing of the person committing the offense."

Anthony contends the evidence is insufficient to sustain the court's true finding on counts 1 and 2 because the evidence did not show that he "caused another" to touch "an intimate part" belonging to him or the victims. We agree the evidence is insufficient, albeit for the reasons discussed below.

"In assessing the sufficiency of the evidence to sustain a conviction, this court must view the entire record, including all reasonably deducible inferences, in the light most favorable to the judgment. The conviction will be upheld if it is supported by substantial evidence, i.e., evidence that is credible and of solid value. [Citations.] It is only when the evidence, so viewed, would not permit any reasonable trier of fact to have found the defendant guilty beyond a reasonable doubt that the judgment will be reversed. [Citation.]" (*People v. Elam* (2001) 91 Cal.App.4th 298, 309-310.)

Here, the evidence failed to show that Anthony caused either victim to touch the skin of an intimate part of his body or of anyone else's body. Additionally, as to count 2 the evidence failed to establish that Anthony used any unlawful restraint when he touched Sarah's breast after reaching into her window. Thus the evidence was insufficient to sustain the court's finding that Anthony violated section 243.4, subdivision (d).

Moreover, " '[w]hen a defendant pleads not guilty, the court lacks jurisdiction to convict him of an offense that is neither charged nor necessarily included in the alleged crime. [Citations.] This reasoning rests upon a constitutional basis: "Due process of law requires that an accused be advised of the charges against him in order that he may have a

reasonable opportunity to prepare and present his defense and not be taken by surprise by evidence offered at his trial." [Citation.]' " (*People v. Lohbauer* (1981) 29 Cal.3d 364, 368.)

In *Lohbauer* the court further explained that the notice required by due process is given, with respect to lesser offenses, *either* "when the specific language of the accusatory pleading adequately warns the defendant that the People will seek to prove the elements of the lesser offense . . .," *or* when "the lesser offense is 'necessarily included' within the statutory definition of the charged offense . . . ." (*Lohbauer*, *supra*, at p. 369.)

Sexual battery in violation of section 243.4, subdivision (d) requires that the defendant or an accomplice cause a person, *while the person is unlawfully restrained*, to touch the skin of an intimate part of the defendant, an accomplice, or a third person. Sexual battery in violation of section 243.4, subdivision (e)(1) requires the defendant to touch an intimate part of the victim.[2] Thus, a violation of section 243.4, subdivision (e)(1) is not a lesser included offense of section 243.4, subdivision (d) because these offenses are mutually exclusive.

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[2] Section 243.4, subdivision (e) provides:

> "(1) *Any person who touches an intimate part of another person*, if the touching is against the will of the person touched, and is for the specific purpose of sexual arousal, sexual gratification, or sexual abuse, is guilty of misdemeanor sexual battery, punishable by a fine not exceeding two thousand dollars ($2,000), or by imprisonment in a county jail not exceeding six months, or by both that fine and imprisonment. . . .
>
> "(2) As used in this subdivision, 'touches' means physical contact with another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim." (Emphasis added.)

Anthony nevertheless contends that we may reduce the court's finding in counts 1 and 2 to violations of section 243.4, subdivision (e)(1) because the language of those counts "implicates" a violation of that subdivision. Anthony's concession is ill advised.

As used in section 243.4, subdivision (d) "touch" means "physical contact with the skin [of an intimate part] of another person whether accomplished directly or through the clothing of the person committing the offense." (§ 243.4, subd. (f).)

As used in Section 243.4, subdivision (e)(1), "touches" means "physical contact with [the intimate part of] another person, whether accomplished directly, through the clothing of the person committing the offense, or through the clothing of the victim." (§ 243.4, subd. (e)(2).) The definition of "touches" as used in section 243.4, subdivision (e)(1) is different from that of "touch" in subdivision (f) in two ways: it does not expressly require actual contact with the skin, and it applies to touching through the clothes of the victim. (*People v. Dayan* (1995) 34 Cal.App.4th 707, 716.) Subdivision (f)'s narrower definition of "touch" was incorporated into counts 1 and 2 because those counts each alleged a violation of section 243.4, subdivision (d) and, as previously noted, subdivision (f) states that its definition of "touch" applies to subdivision (d) of section 243.4. Further, touching is an element of a violation of section 243.4, subdivision (e)(1) (CALJIC No. 16.145) and, as noted, the meaning of "touches" in that subdivision is broader than the meaning of "touch" used in section 243.4, subdivision (d). In view of this, we conclude that the language of counts 1 and 2 did not adequately warn Anthony that the People would seek to prove the "touch[ing]" element of section 243.4, subdivision (e)(1). Accordingly, we will reverse the court's true findings on counts 1 and 2.[3]

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[3] Our finding on this issue makes it unnecessary to consider Anthony's contention that counts 1 and 2 should be dismissed because they are lesser included offenses of the annoying a child offenses found true by the court in counts 3 and 4.

The Felony False Imprisonment Offense Charged in Count V

Anthony contends the evidence is insufficient to sustain the court's finding that count V was a felony because there is no evidence that he used more force than that required to affect the false imprisonment. We agree.

" 'False imprisonment is the unlawful violation of the personal liberty of another.' (§ 236; [Citations].) In this context, ' "[p]ersonal liberty" ' is violated when 'the victim is "compelled to remain where he does not wish to remain, or to go where he does not wish to go." ' [Citations.] It is the restraint of a person's *freedom of movement* that is at the heart of the offense of false imprisonment embodied in section 237. [Citation.] ' " 'The wrong may be committed by acts or by words, or both, and by merely operating upon the will of the individual or by personal violence, or both. . . .' " ' [Citations.]
The offense becomes felonious when it is '*effected* by violence, menace, fraud, or deceit . . . .' (§ 237; [Citation].) ' "Violence" . . . means the " '*the exercise of physical force used to restrain over and above the force reasonably necessary to effect such restraint*.' " ' [Citations.] 'Menace' is defined as ' " 'a threat of harm express or implied by word or act.' " ' [Citation]." (*People v. Reed* (2000) 78 Cal.App.4th 274, 280, second two italics added.)

Here, the only force Anthony used to restrain Maureen was the force he applied when he prevented her from leaving by putting his arm around her waist. Thus the record does not disclose that he used any more force to restrain Maureen over and above that necessary to restrain her.

Respondent contends that he used additional force because while restraining her he grabbed her buttocks and her breast. However, it does not appear from the record that the force he used to accomplish these acts was also directed at restraining her. Accordingly, we agree with Anthony that the evidence was insufficient to sustain the court's finding that he committed felony false imprisonment.

DISPOSITION

The judgment is reversed. On remand, the trial court shall enter an order reducing the felony false imprisonment offense, count 5, to a misdemeanor and shall thereafter conduct a new dispositional hearing with respect to counts 3, 4 and 5. Retrial on counts 1 and 2 is barred.